IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.685/2004

Reserved on.15.6.2007

Decided on.2.8.2007

Dharam Lal **…Petitioner.**

Versus

State of H.P. and others. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.No*

For the petitioner : Mr. Sandeep Kaushik, Advocate.

For the respondents Mr. M. S. Chandel, Advocate General, with Mr. M.A. Khan and Ms. Meenakashi Sharma, Deputy Advocate Generals \ for respondents No.1 to 3.

Rajiv Sharma, J.

The brief facts which can be culled out from the pleadings of the parties are that the respondent No.4 had sent a complaint to the Deputy Commissioner, Kinnaur District at Reckong Peo on 29th July, 2003 against the petitioner. The petitioner was elected Pradhan, Gram Panchayat, Kalpa in year 2000. A show cause notice was issued to him on 31.10.2003 for the alleged violation of section 122 (1) (n) of the Panchayati Raj Act, 1994. The gist of the notice issued to him was that he had encroached upon the Government land comprising khasra No.4 and had applied for regularization of the same on 14.8.2002. He had filed reply to the show cause notice and had specifically denied that he had ever encroached upon any Government land personally. It is mentioned

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No

in the reply to the show cause notice that the settlement officials made a case of khasra No.4 in favour of his fore-fathers vide Missal No.73 in the settlement operation. The Secretary (Panchayati Raj) had issued notice to him on 22.7.2004. He had filed a detailed reply to the same on 5.8.2004. The Secretary (Panchayati Raj) had passed the impugned order on 1st September, 2004 ordering the removal of the petitioner from office of Pradhan, Gram Panchayat, Kalpa.

Mr. Sandeep Kaushik, Advocate had strenuously argued that the case of the petitioner was squarely covered by the judgment of this Court rendered in ***Surinder Singh Banolta Vs. State of H.P. & others*** reported in Latest HLJ 2003 (2) 782. He had further submitted that the judgment of this Court has been upheld by the Hon'ble Supreme Court on November 24, 2006.

The learned Advocate General had supported the order dated 1st September, 2004.

I have heard the learned counsel for the parties and perused the record.

Before the rival submissions of the learned counsel are taken for consideration, it will be appropriate to refer to few relevant sections of H.P. Panchayati Raj Act, 1994.

Section 122 of the H.P. Panchayati Raj Act, 1994 deals with disqualification and reads as under:

> **"122. Disqualifications.-(1) A person shall be disqualified for being chosen, as and for being, an office bearer, of a Panchayat-**

(a) if he is so disqualified by or under any law for the time being enforce for the purposes of the election of the State Legislature:

Provided that no person shall be disqualified on the ground that he is less than 25 years, if he has attained the age of 21 years;

(b) if he has been convicted of any offence involving moral turpitude, unless a period of six years has elapsed since his conviction; or

(bb) if he has been found to have been guilty of any corrupt practices under section 180 of this Act; or

(c) if he or any of his family member(s) has encroached upon any land belong to, or taken on lease or requisitioned by or on behalf of, the State Government, a Municipality, a Panchayat or a Co-operative Society unless a period of six years has elapsed since the date on which he or any of his family member, as the case may be, is ejected there from or ceased to be the encroacher; or

***Explanation*.- For the purpose of this clause the expression "family member" shall mean the spouse, their son(s), unmarried daughter(s) and adopted son and unmarried daughter.**

(d) if he has been convicted of an electoral offence under Chapter-X-A of this act or under any law for the time being in force; or

(e) if he has been ordered to give security for good behaviour under section 110 of the Code of Criminal Procedure, 1973; or

(f) if he has been removed from public service or disqualified in public service.

(g) If he is in the employment or service under any Panchayat or of any other local authority or Co-

operative Society or the State Government or Central Government or any Public Sector undertaking under the control of the Central or the State Government.

Provided that an office bearer shall not be disqualified for being a office bearer of the Panchayat if he is directly or indirectly engaged in any work being executed by another Panchayat of which he is not the office bearer;

Explanation.- For the purposes of this clause the expression "service" or "employment" shall include persons appointed, engaged or employed on whole time, part time, casual, daily or contract basis.

(h) If he is registered as a habitual offender under the Himachal Pradesh Offender Act, 1969; or

(i) If, save as hereinafter provided, he has directly or indirectly and share or interest in any work done by a order of a Panchayat, or in any contract or employment with, or under, or by, or on behalf of, the Panchayat; or

(j) If he has not paid the arrears of any tax imposed by a Panchayat or had not paid arrears of any kind due from him to the Sabha, Samiti or Zila Parishad Fund; or has retained any amount which forms part of, the Sabha, Samiti or Zila Parishad Fund;

(k) If, he is a tenant or lessee holding a tenancy or lease under a Panchayat, is in arrears of rent of lease or tenancy held under the Panchayat;

(l) If he has been convicted of an offence punishable under the Protection of Civil Rights Act, 1955, unless a period of six years has elapsed since his conviction;

(m) If he is so disqualified by or under any other law made by the State Legislature; and

(n) If he has made any false declaration as required under this Act or the rules made thereunder;

(o) Deleted

(2) The question whether a person is or has become subject to any of the disqualifications under sub-section (1), shall after giving an opportunity to the person concerned of being heard, be decided-

(i) if such question arises during the process of an election, by an officer as may be authorized in this behalf by the State Government, in consultation with the State Election Commission; and

(ii) if such question arises after the election process is over, by the Deputy Commissioner.

Section 146 of the Act deals with removal of office bearers of Panchayats and reads as under:

146. Removal of office bearers of Panchayat.- (1) The State Government, in the case of office bearers of Panchayats, the Divisional Commissioner having jurisdiction, in the case of office bearers of Zila Parishad, and the Deputy Commissioner having jurisdiction, in the case of office bearers of Panchyat Samiti and Gram Panchyat, as the case may be, after such enquiry as it may deem fit to make at any time, remove an office bearer.

(a) if he has incurred any disqualification under this Act;

(b) if he has been guilty of misconduct in the discharge of his duties; or

(c) if he refuses to act or becomes incapable of action or is adjudged an insolvent;

(d) if he without reasonable cause absents himself from more than half of the meetings convened within a period of six months;

(e) if his continuance in office is undesirable in the interest of the public;

Provided that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office.

***Explanation*.- For the purpose of this sub-section "misconduct" shall include-**

(a) any action which adversely affects-

i. the sovereignty, unity and integrity of India; or

ii. the harmony and the spirit of common brotherhood amongst all the people of State transcending religious, linguistic, regional, caste, or sectional diversities; or

iii. the dignity of women; or

(b) gross negligence in the discharge of the duties Act;

(c) the failure of the Pradhan of a gram Panchayat, or Chairman of Panchayat Samiti or Zila Parishad, to convene the meeting of the Gram Sabha, Gram Panchayat, Panchayat Samiti or Zila Parishads, as the case may be, at regular intervals as specified under this Act.

(1-A) The State Government, the Divisional Commissioner or the Deputy Commissioner, as the case may be, may, on consideration of the enquiry report or if it thinks proper, for reasons to be recorded in writing, revoke the suspension order and instead of removing an office bearer, warn him to be vigilant in the discharge of his duties or may also debar him from taking part in any act or proceedings of the Panchayat for the period of six months.

(2) A person who has been removed under sub-section (1) shall forthwith cease to be a member of any other Panchayat of which he is a member, such person shall also be disqualified for a period of six years to be elected as office bearer of a Panchayat under this Act.

Section 175 of the Act deals with grounds for declaring election to be void which reads as under:

175. Grounds for declaring elections to be void.(1) If the authorized officer is of the opinion-

(a) that on the date of his election the elected person was not qualified, or was disqualified to be elected under this Act; or

(b) that any corrupt practice has been committed by the elected person or his agent or by any other person with the consent of the elected person or his agent; or

(c) that any nomination has been improperly rejected, or

(d) that the result of the election, in so far as it concerns the elected person, has been materially affected-

i.by the improper acceptance of any nomination, or

ii.by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

iii.by any non-compliance with the provisions of this act or of any rule made under this Act, the authorized officer shall declare the election of the elected persons to be void.

(2) Subject to the provisions of section 175-A, when an election of an elected person has been declared to be void under sub-section (1), a fresh election shall be held under this provisions of this Act and the rules made thereunder."

A Division Bench of this Court has interpreted section 122 (ii) H.P. Panchayati Raj Act, 1994 in ***Surinder Singh Banolta Vs. State of H.P. and others*** reported in Latesh HLJ 2003 (2) 782. Their Lordships have held as under:

"Whether the petitioner had encroached upon any land belonging to a municipality etc. or not, indeed was an issue which was relevant in so far as time period was concerned, in the sense that if he had encroached upon the land (and was

thus an encroacher) before or during the process of his election as an office bearer of Member of Zila Parishad, his case fell under Clause (1) of sub section (2) of Section 122 and, therefore, in terms of that clause the authorized officer could have decided that issue before or during the process of election itself. In other words, if during the process of Election or even before the election had started (at the stage of filing of nomination papers etc.) if it was brought to the notice of the authorized officer that the petitioner had encroached upon the land and was thus an encroacher and, hence disqualified for being chosen as a member of the Zila Parishad, such a question could have been adjudicated upon at that stage and the authorized officer could have debarred the petitioner from contesting the election by declaring him disqualified for being chosen as such a Member.

Clause (ii) of sub section (2) of section 122, however, deals with the issue of the person encroaching upon any land belonging to the municipality etc. but, at a point of time after the election process is over. It is in this context that the expression "for being" as occurring in clause (1) of section 122 (supra) in so far as an office bearer is concerned assumes relevance because there can be situations where a person after having been elected as a Member of Zila Parishad encroaches upon any land belonging to a municipality and in such a fact situation, a question may arise as to whether, at a stage when the election process is already over, he has encroached upon such a land and that issue, in terms of clause (ii) (supra) would be decided by the Deputy Commissioner. At the risk of repetition, we may reiterate the legal position and summarise it as precisely as possible, in the following para.

If the issue of encroachment upon a land relates to a time period prior to the holding of the election or during the process of election, it can be decided by the authorized officer and if the authorized officer comes to a conclusion that the person who proposes to contest the election has encroached upon the land in question, he being disqualified in terms of

clause (c) of sub section (1) of section 122, an order can be passed by the authorized officer declaring him to be so disqualified and then debarring him from contesting the election (see clause (i) of sub section (2) of section 122 (supra).

If, however, a person was not an encroacher of the land in question at a stage during the process of the election or prior to it, (as far as the election goes), and if the allegation is that he encroached upon the land after the election process is over, in other words, the allegation is that he encroached upon the land after having been chosen as a Member of the Zila Parishad, such a question has to be referred to the Deputy Commissioner for being decided by him and if he comes to a conclusion and renders a finding that indeed such a person had encroached upon the land after having been chosen as a member of Zila Parishad, he is disqualified "for being" a member of Zila Parishad and thus the natural consequence would follow. This is the mandate and the scope of clause (ii) of sub section (2) of Section 122 (supra).

What would be the natural consequence and in what manner the Deputy Commissioner decided such an issue in terms of clauses (2) (supra) has been indicated in section 131 of the 1994 Act, relevant extract whereof reads thus:

(1) if any person having been elected as an office bearer of a

a. subsequently becomes subject to any of the disqualification mentioned in section 122 and such disqualifications is not removable or being removable is not removed.

b. Absents himself from three consecutive meetings of the Panchayat or its Committee or does not attend half the number of meetings held during the period of six months without the leave of the Panchayat, he shall, subject to the provisions of sub-section (2) cease to be

such office bearer and his office shall be vacant:

Provided that where an application is made by an office bearer to the Panchayat for leave to absent himself under clause (b) and the Panchayat fails to inform the applicant of its decision on the application within a period of one month from the date of receipt of the applicant, the leave applied, shall be deemed to have been granted by the Panchayat.

(2) In every case the authority competent to decide whether a vacancy has occurred under sub section (1) shall be the Deputy Commissioner in respect of Gram Panchayat and Panchayat Samiti and the Director in respect of Zila Parishad who may give his decision either on an application made to him by any person or on his own motion. Until the Deputy Commissioner or the Director, as the case may be, decides that the vacancy has occurred, the person shall not ceased to be in office bearer:

Provided that no order shall be passed under this sub section against any office bearer without giving him a reasonable opportunity of being heard.

It, therefore, clearly emerges from a combined reading of sub section (2) of section 122 and sub-section (1) and (2) of Section 131 that if any person having been elected as a Member of Zila Parishad subsequently "becomes subject to a disqualification", including a disqualification mentioned in clause (C) of sub section (1) of section 122 the Deputy Commissioner may decide the issue and also decide that a vacancy has occurred and that the person chosen shall cease to be a member of office bearer, as the case may be Proviso to sub section (2) of Section 131 clearly lays down that no orde shall be passed against such a person without giving him a reasonable opportunity of being heard.

It would thus be clear that the scope of clause (ii) of sub section (2) of section 122 is limited only to such fact situations where the allegation of encroachment upon the land of a municipality relates to a period of time after the election process was over, and not before the election process had started or during its pendency.

Having noticed the aforesaid two fact situation, one where the encroachment issue related to a time period during the election process or prior to same and having been brought to the notice of the authorized officer, and the second fact situation where the encroachment issue related to a time period after the election process was over, we now turn to a 3rd fact situation where even though the allegation of encroachment relates to a time period prior to the holding of the election or even during the process of the election but no complaint was made to the authorized officer in terms of clause (i) of sub section (2) section 122 (supra) and because of the absence of any such allegation, complaint or information, the person concerned was allowed to contest the election and also to be chosen as a member of the Zila Parishad despite the fact that he was an encroacher of the land. The fact remains that an encroacher of the land was always disqualified to be chosen as a Member but the information was either not available at the relevant time, or not having been furnished to the authorized officer, the fact situation allowed such a person to be chosen as a Member.

It is not that the law did not stipulate or provide for, any remedy against such a person and in such a fact situation. The remedy lay in Chapter XI of the 1994 Act wherein it has clearly been provided that the election of any person chosen under this Act can be called in question through an election petition on one or the other of some of the grounds specified in sub section (1) of section 175. For ready reference, we reproduce herein below section 175 which read thus:

175. (1) If the authorized officer is of the opinion-

(a) that on the date of his election the elected person was not qualified, or was disqualified to be elected under this Act; or

(b) that any corrupt practice has been committed by the elected person or his agent or by any other person with the consent of the elected person or his agent; or

(c) that any nomination has been improperly rejected, or

(d) that the result of the election, in so far as it concerns the elected person, has been materially affected-

i. by the improper acceptance of any nomination, or

ii. by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

iii. by any non-compliance with the provisions of this act or of any rule made under this Act,

iv. the authorized officer shall declare the election of the elected persons to be void.

(2) When an election has been set aside under sub section (1), a fresh election shall be held.

It would thus be clear that the scope of clause (ii) of sub section (2) of Section 122 is limited only to such fact situations where the allegation of encroachment upon the land of a municipality relates to a period of time after the election process was over; and not before the election process had started or during its pendency.

The judgment rendered by the Division Bench of this Court has been upheld in Civil Appeal No. 5186 of 2006 by the Hon'ble Supreme Court vide decision dated 24th November, 2006 in case titled ***as "State of Himachal Pradesh and others Versus Surinder Singh Banolta".*** Their Lordships of the Hon'ble Supreme Court have held as under:

"Mr. J.S. Attri, learned AAG appearing on behalf of the appellants would submit that although the provisions of Section 163 are ordinarily required to be taken recourse to but having regard to the fact that in terms of Sub-section (2) of Section 122 of the Act, the question as regards declaring a candidate as disqualified may arise not only before an election is held but also after the election process is over; and thus, whereas in the former case, it will be the Authorized Officer concerned who can determine the question of disqualification but in a case where processes are initiated after the election, the Deputy Commissioner alone would be the prescribed authority.

Section 163 of the Act provides for filing of an election petition on one or more grounds specified in Sub-section (1) of Section 175 thereof. Clause (a) of Sub-section (1) of Section 175 of the Act inter alia lays down a ground for setting aside of an election if on the date of the election the elected person was not qualified or disqualified to be elected under the Act.

It is no doubt true that Section 122 contemplates both the situations, viz., where a person shall be disqualified for being chosen as also for being an office bearer of panchayat inter alia if he has encroached upon any land belonging to any authority mentioned therein. In view of the language of the said provision, we are of the view that whereas an issue falling under clause (1) of Sub-section (2) of Section 122 of the Act must be determined before the Authorised Officer, any order of encroachment passed after the election process is over would be determined by the Deputy Commissioner.

The provisions of the Act, as noticed hereinbefore, have been enacted pursuant to or in furtherance of the constitutional mandate contained in Part IX of the Constitution of India. The provisions of the Act, therefore, are required to be construed strictly in terms thereof. Clause (b) of Article 243O of the Constitution of India mandates that no election shall be set aside save and except by an order passed by the Authorised Officer. In our considered opinion, Section 122 of the Act must be read in the light thereof. Section 162 of the Act expressly provides for the exclusive jurisdiction of the

Authorised Officer to determine the existence or otherwise of any ground enumerated in Section 175 of the Act.

Once, thus, a person is declared to be an encroacher prior to the date on which he has been declared as elector and if the said order has attained finality, the question as to whether he stood disqualified in terms of the provisions of Section 122 of the Act, in our opinion, must be raised by way of an election petition alone. If the submission of Mr. Attri is to be accepted, the same may result in an anomalous position.

If a candidate or a voter had the knowledge that the elected candidate was disqualified in terms of Section 122 of the Act, he may file an application. The order of eviction may come to the notice of some other person after the election process is over. A situation, thus, may arise where two different proceedings may lie before two different authorities at the instance of two different persons. Two parallel proceedings, it is well settled, cannot be allowed to continue at the same time. A construction of a statute which may lead to such a situation, therefore, must be avoided. It will also lead to an absurdity if two different Tribunals are allowed to come to contradictory decisions.

Furthermore, it is a well-known principle of law that where literal interpretation shall give rise to an anomaly or absurdity, the same should be avoided. [See Ashok Lanka v. Rishi Dixit, (2005) 5 SCC 598 and M.P. Gopalakrishnan Nair v. State of Kerala,(2005) 11 SCC 45]

It is also a well-settled principle of law that in a case where a statute is found to be obscure the same must be interpreted having regard to the constitutional scheme. In a case of this nature, the doctrine of purposive construction should be applied. [See Bombay Dyeing & Mfg. Co. Ltd.(3) v. Bombay Environmental Action Group & Ors. (2006) 3 SCC 434, Nathi Devi v. Radha Devi Gupta (2005) 2 SCC 271, Lalit Mohan Pandey v. Pooran Singh & Ors. (2004) 6 SCC 626, Indian Handicrafts Emporium & Ors. v. Union of India & Ors. (2003) 7 SCC 589 and Balram Kumawat v. Union of India & Ors. (2003) 7 SCC 628]

It is also well-settled that the entire statute must be read as a whole. The relevant provisions of the Constitution as also those in the statute must, thus, be read harmoniously. [See Bombay Dyeing (supra) and Secretary, Department of Excise & Commercial Taxes and Others v. Sun Bright Marketing (P) Ltd., Chhattisgarh and Another [(2004) 3 SCC 185]. So read, we are of the opinion that the Division Bench of the High Court was correct in its view. The matter might have been different if Respondent No. 1 was declared to be an encroacher after the election process was over and, thus, becoming disqualified to continue to be an office bearer of Panchayat or Zilla Parishad.

The basis for initiating the proceedings against the petitioner under the H.P. Panchayati Raj Act, 1994) is the complaint made by respondent No.4 dated 29th July, 2003. It has come in the report of Tehsildar, Kalpa that the petitioner had encroached on the Government land and had filed application for regularization of land on 14.8.2002. The proceedings in fact were initiated against him by the Deputy Commissioner, Kinnaur under section 122 (n) of the H.P. Panchayati Raj Act, 1994. He had filed reply to the same and stated in his reply that he had not encroached upon any land personally and the so called encroached land had actually been inherited by him from his forefathers through a proper mutation but during the recent settlement, the revenue authorities had segregated the particular land and prepared a case of encroachment. The proceedings initiated against him under section 122 (1) (n) of the H.P. Panchayati Raj Act, 1994 were abruptly dropped. Thereafter he had been served with a notice by the Secretary (Panchayat Raj) on 22.7.2004 for violation of section 122 (c) and (n) of the H.P. Panchayati Raj Act, 1994. He had filed reply to the same. The Secretary (Panchayati Raj) had misconstrued the judgment rendered by a Division Bench of this Court while passing order dated 1st September, 2004. In the present case, the encroachment made by the petitioner was known at the time of election to all concerned. It

cannot be presumed by any stretch of imagination that the fact that the petitioner/his fore-fathers had encroached upon the Government land had come to the notice of the authorities in the year 2003 as argued by the learned Advocate General. The fact that the petitioner had encroached upon the land was within the knowledge of the Revenue Field Agency at the time of settlement.

The Secretary (Panchayati Raj) in similar set of facts had dismissed the revision petition in the matter of ***Yashwant Singh Versus Deputy Commissioner, Kinnaur*** on 15.6.2004. by relying upon the judgment of this Court rendered in ***Surinder Singh Banolta Vs. State of H.P. & others*** reported in Latest HLJ 2003 (2) 782. He had categorically come to the conclusion in his order that the very issue of encroachment had come to the notice well before the election during settlement operation and this fact was within the knowledge of all concerned and on that basis he had upheld the order of the Director, Panchayati Raj. The Secretary (Panchayati Raj) had taken two different views on the same and similar facts. There ought to have been consistency in the orders passed by the authorities concerned. The facts of the present case are similar to the case of Shri Yashwant Singh, which was decided by the Secretary (Panchayati Raj) on 15.6.2004 on the basis of judgment of this Court but the Secretary (Panchayati Raj) vide its decision dated 1st September, 2004 has taken a diametrical opposite view.

The upshot of the above discussion is that the case of the petitioner is squarely covered by the judgment of this Court rendered in ***Surinder Singh Banolta Vs. State of H.P. & others*** reported in Latest HLJ 2003 (2) 782. The fact of encroachment was known to all the concerned at the time of filing of nomination by the petitioner. The only remedy provided in the present case was to file an election petition. The order passed by

the Secretary (Panchayati Raj) dated 1st September, 2004 is liable to be quashed and set aside.

Accordingly, the writ petition is allowed. Annexure P-3, dated 1st September, 2004 is quashed and set aside. There shall be no order as to costs.

(Rajiv Sharma), Judge

August 2, 2007
Awasthi